Supreme Court, U.S.
FILED

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No.

SUPREME COURT OF THE UNITED STATES

October 1997 Term

IVAN M. NAUMOV, M.D.,

Petitioner,

vs.

UNIVERSITY OF PITTSBURGH

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57pp

QUESTIONS PRESENTED

1. WHETHER THE FOLLOWING AFFIDAVIT OF INCOME SO FAR FAILS TO COMPLY WITH THE ORDER OF COURT PRECEEDING IT AS TO WARRANT DISMISSAL OF THE PETITIONERS CASE PURSUANT TO FED. R. CIV. P. 41(b) WHERE ALL INCOME WAS IN FACT DISCLOSED IN THE AFFIDAVIT:

THE ORDER:

THE COURT: You should provide an affidavit that this is all he received. He should be able to determine all monies he has gotten from work he has done.

THE AFFIDAVIT:

AFFIDAVIT OF INCOME

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

I, Ivan M. Naumov, depose and say that my total income for the year 1993 is as follows:

Records Review and Research	$ 450.00
Tutoring	1,455.00
A&A Expert Software	5,728.00
Software Sales	297.00
	$7,930.00

[Verification]
[Dated] June 9, 1995 S/I. Naumov

(One of the three affidavits submitted by Petitioner, for 1993, 1994, and part of 1995)

2. WHETHER THE EXTREME DISCOVERY SANCTION OF DISMISSAL MAY BE IMPOSED WITHOUT ARTICULATION OF THE COURT'S REASONING AND WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS THUS DEPARTED NOT ONLY FROM THIS COURT'S STANDARDS BUT FROM THOSE OF THE REMAINING CIRCUIT COURTS OF THE UNITED STATES.

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REPORTS OF PREVIOUS OPINIONS

A Report and Recommendation was authored by Magistrate Judge Ila Jeanne Sensenich of the United States Court for the Western District of Pennsylvania on April 15, 1996 and is set forth at Appendix 1a.

A Memorandum Order was entered on May 9, 1996, by the Honorable William L. Standish, affirming the Magistrate Judge's recommendation. A Motion Requesting a Hearing for Further Findings and Reconsideration of the Memorandum Order of May 9, 1996 was denied by the District Court on May 20, 1996. These orders are set forth at Appendix 15a and 17a, respectively.

A Judgment Order was entered by the United States Court of Appeals for the Third Circuit on February 6, 1997 affirming the decision of the District Court, and a Petition for Panel Rehearing with Suggestions for Rehearing In Banc was denied by the Circuit Court on March 28, 1997. These orders are set forth at Appendix 18a and 20a, respectively.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on February 6, 1997, affirming the decision of the United States District Court for the Western District of Pennsylvania. Rehearing was denied on March 28, 1997.

Jurisdiction to review the judgment entered by the United States Court for the Third Circuit is conferred upon the this Court by 18 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Fourteen

Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.

28 U.S.C. §§ 1331, 1343

42 U.S.C. § 12101 et seq.

Title VII, Civil Rights Act of 1964, as amended by Civil Rights Act of 1991, 42 U.S.C. § 2000d, 2000e et seq.

STATEMENT OF THE CASE

The Petitioner is a physician and a medical researcher with a distinguished academic and professional record attained in Europe, Australia and the United States. He is an author of 40 scientific papers including chapters in medical ethics texts. Petitioner served Respondent nearly four years as a member of its research faculty. He was studying at the Respondent's Graduate School of Public Health (GSPH), in the Human Genetics Ph.D. program, when he suffered a serious accident which caused multiple orthopedic injuries resulting in permanent bone, muscle and nerve damage. He required extensive and complex surgery including bone grafting. As a result of the accident, Petitioner has a permanent manual disability as well as other disabilities.

Despite numerous requests from the Petitioner and his physicians, some administrators and instructors at Respondent's institution repeatedly denied Petitioner reasonable accommodation, e.g., additional time to complete written examinations and other written or manual tasks. The denial of accommodation made it physically impossible for Petitioner to complete examinations and other manual tasks within mandated time limits. As a direct consequence, Petitioner received poor grades in two courses which caused his otherwise outstanding grade average to fall below the 3.0 minimum requirement.

The Respondent subjected Petitioner to discrimination because of his handicap and his national origin (Former Yugoslavia.) The Petitioner was summarily dismissed as a student and employee from

GSPH. Petitioner was denied due process protection afforded students and employees by Respondent's own guidelines and state and federal law. As a direct consequence of Respondent's discriminatory actions, Petitioner's research career and professional reputation have been severely impaired.

The instant case involves the dismissal of the Petitioner's *meritorious* (this was conceded by the Magistrate Judge recommending dismissal) case because of a perceived violation of Rule 41 of the Federal Rules of Civil Procedure. An oral order of the Magistrate Judge that Petitioner "... provide an affidavit that this is all he received. He should be able to determine all monies he has gotten from work he had done." was the instrument utilized to effect the dismissal of this action. Obviously, the order does not call for *any* itemization of Petitioner's income, e.g., per year, employer, type of work activity, etc.

The Petitioner submitted the following affidavits accompanied by his tax records after having prepared them with the assistance of his counsel and a lawyer/accountant skilled in the review and preparation of financial documents:

AFFIDAVIT OF INCOME

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

I, Ivan M. Naumov, depose and say that my total income for the year 1993 is as follows:

Records Review and Research	$ 450.00
Tutoring	1,455.00
A&A Expert Software	5,728.00

Software Sales	297.00
	$7,930.00

[Verification]
[Dated] June 9, 1995 S/I. Naumov

AFFIDAVIT OF INCOME

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

I, Ivan M. Naumov, depose and say that my total income for the year 1994 is as follows:

Tutoring/Lectures	$ 527.00
Community College	4,800.00
Software Sales	1,119.00
	$6,446.00

[Verification]
[Dated] May 24, 1995 S/I. Naumov

AFFIDAVIT OF INCOME

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

I, Ivan M. Naumov, depose and say that my total income for the year 1995 is as follows:

Records Review and Research	$ 800.00
Tutoring	650.00
A&A Expert Software	3,507.00
Software Sales	504.00
	$5,461.00

[Verification]
[Dated] May 24, 1995 S/I. Naumov

The affidavits identify *employers* by name and describe *self-employment income* by the type of work performed.

This response was deemed to be noncompliant by the Magistrate Judge. She recommended dismissal of the action because of the Petitioner's failure to articulate within the "software sales" sections of the affidavits, the entity or entities whose software he sold. The income in question is a *self-employment* income totaling $1,920 for 1993, 1994 and part of 1995. The Petitioner sold software manufactured by Expert Choice, Inc. In an affidavit, this company stated that petitioner was never its employee. Dismissal of the action occurred without the Petitioner ever having been afforded an opportunity or indeed having been requested by opposing counsel or the court to further clarify any aspect of the affidavits submitted.

It is the Petitioner's contention that dismissal of the action and the lower court's failure to articulate the grounds for dismissal violates the Federal Rules of Civil Procedure applicable to discovery as well as the spirit of those rules, and runs afoul of every relevant precedent of this Court and any Circuit Court of the United States.

ARGUMENT

I. THE DISMISSAL OF THE PETITIONER'S COMPLAINT WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION BECAUSE IT DISREGARDED AND EFFECTIVELY TOPPLED STANDARDS FOR COMPLIANCE WITH DISCOVERY ORDERS AND IMPOSITION OF SANCTIONS SUPPORT OF THIS CONDUCT BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CREATES A PATENT CONFLICT BETWEEN IT AND THE REMAINING CIRCUIT COURTS.

A. Petitioner complied in full with the District Court's discovery order and provided all information mandated by that order; therefore no sanction was warranted.

The discovery order at issue in this controversy was handed down from the bench at a hearing as follows:

> THE COURT: You should provide an affidavit that this is all he received. He should be able to determine ***all monies he has gotten from work he has done.*** " (Emphasis added.)

There was no elaboration, no requirement that Petitioner identify the parties that paid him, no requirement that Petitioner state what type of work he did. The phrase "source of income" was not used. The court in fact went on to limit the order to the words of the transcript and to emphasize the order's narrow scope:

> THE COURT: Does that cover all of the outstanding issues?
> DEFENSE COUNSEL: I think everything except for the request for fees.

DEFENSE COUNSEL: I think everything except for the request for fees.
THE COURT: I am going to deny that at this time.
THE COURT: I will say the *transcript* will be the record of my disposition of the motion. (Emphasis added)
THE COURT: I will say that *my statements here disposing of your Motion to Compel are an Order of Court disposing of your Motion.*

The Respondent requested no elaboration at the time of submission of the affidavits. On July 11, 1995, the Magistrate Judge extended discovery to August 15, 1995. Respondent again failed to request elaboration concerning the accurately reported income. Seven months later, on or about February 6, 1996, Respondent served a subpoena on Expert Choice, Inc. That company confirmed that Petitioner was never its employee and that he had earned only commissions. *These sums*, totaling $1,920.00 for 1993, 1994, and part of 1995, *reported under the heading "**Software Sales**," above, were the same commissions, in the same amounts, disclosed in the income affidavits submitted in June 1995—seven months earlier.* To warrant dismissal, violation of a court order must be established. Fed. R. Civ. P 41. *After the fact*, Respondent asserted that the order required Petitioner to identify *sources* of income.[1]

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[1] The word "source," is ambiguous and would have been subject to controversy if it had been used, absent elaboration by the court. It is arguable whether "source" in this context refers to the type of work that generated the income--which Petitioner identified as "software sales"--or to the identity of the payor. On advice of counsel and his accountant, Petitioner identified *employers* by name and described *self-employment income* by the type of work performed. The names of payors would have been easily available had Defense Counsel requested them by proper means, i.e., conferral, as required by Local Rule 7.1C.

The phrase "sources of income" is materially different from the actual words used: "all monies he has gotten." Yet the Magistrate Judge adopted the misleading altered language after the fact, and recommended dismissal for Petitioner's asserted failure to provide information that the court had not ordered him to provide:

> Plaintiff's failure to reveal...that he received income from Expert Choice, Inc., after a long history of Defendant's attempts to obtain all of his *sources of income*, requires that Defendant's Motion to Dismiss be granted, and it is so recommended. (Report & Recommendation, Appendix). (Emphasis added.)

This ruling is a facial breach of Fed. R. Civ. P. 41, which permits sanctions only for violation of a court order.

B. If there had been noncompliance, dismissal would be contrary to settled law, as articulated by the Federal Rules of Civil Procedure, the Third Circuit and this Court.

Both the Third Circuit formerly and this Honorable Court have held that sanctions for violation of a discovery order must be just and must be specifically related to the claim at issue in the discovery order. *Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 707; 102 S. Ct. 2099, 2107; L. Ed. 2d, 492 ;(1982). Dismissal of Petitioner's entire action fails this test of proportionality.

If sanctions had been warranted, any of a number of sanctions provided for by Fed. R. Civ. P. 37(b) would have conformed to precedent, been sufficient to secure compliance and preserved fairness to respondent. Historically, this has been the Third Circuit's preferred response, as well as this Court's preferred response, when noncompliance pertaining to specific aspects of a claim has been established - dismissal

is the sanction of last resort. *Poulis v. State Farm Fire & Casualty Co.*, 747 F. 2d 863, 869 (3rd Cir. 1984).

Libbi v. Sears, Roebuck & Co., 107 F.R.D. 227 (1985), heard in the U.S. District Court for the Eastern District of Pennsylvania, illustrates the concern for proportionality. Plaintiff failed to respond to an interrogatory concerning lost earnings. Plaintiff and his counsel made statements that the court deemed fabrications or gross mistakes. The court precluded Libbi from presenting evidence as to past earnings. Dismissal is grossly disproportionate in the instant case, which involved at most explication of matters already disclosed.

The Respondent has shown bad faith, abused process and disregarded court rules in seeking dismissal in the first instance:

> The Clerk of Courts *shall not accept* for filing... any motion relating to discovery, unless said motion is accompanied by a certificate from counsel of record certifying that they have conferred and consulted with respect to each matter set forth in said motion and are unable to resolve the differences which exist. Said certificate shall set forth the exact time and place of the conference and consultation...(Emphasis added.) Local Rule 7.1C, U.S. District Court, W.D. Pa.

Neither the Magistrate Judge nor the District Court took notice of Respondent's disregard for the rule. Nor did the District Court find fault with Respondent's waiting seven months to seek additional information about Petitioner's earnings, then subpoenaing a third party instead of conferring with Petitioner's counsel. Respondent engaged in delaying tactics, then attempted to mislead the court into tolerating abusive discovery.

The Federal Rules of Civil Procedure require efforts to resolve discovery issues without judicial process.

> If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for *appropriate* sanctions. The Motion *must include a certification* that the movant has, *in good faith*, conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure *without Court action*. (Emphasis added.) Fed. R. Civ. P. 37(a)(2)(A).

The Federal Rules consider the movant's good faith in determining whether sanctions are warranted (Fed. R. Civ. P. 37, Advisory Notes to 1993 Amendments). It defies logic to penalize the opposing party, let alone impose a harsher sanction on the opposing party where the movant acts in bad faith. Despite the compulsory language of both local and federal rules, Respondent was not even admonished by the court.

In affirming the District Court's order of dismissal, the Third Circuit overturned its own test for the appropriateness of this most extreme sanction, and substituted for this detailed test a near strict-liability standard, in which any contrived dispute between the parties may be interpreted as misconduct and the smallest errors drive cases out of court. Such standards are unprecedented, separate the Third Circuit from other Circuits and deny litigants the protections that parties in other federal courts may rely on.

Discretion is not arbitrary decision making, rather it is the exercise of the tribunal's authority guided by standards that parties can be reasonably expected to meet, by precedent and by due consideration for justice and equity. Dismissal of the case at hand trumps all these considerations in favor of extraordinarily harsh standards and arbitrary conduct which would allow dismissal of cases at the whimsy of the District Courts.

Poulis v. State Farm Fire & Casualty Co., 747 F. 2d 863, 868 (3rd Cir., 1984), enumerated six factors to be considered before imposing the extreme sanction: (1) The extent of the party's personal responsibility; (2) Prejudice; (3) The history of dilatoriness; (4) Willfulness or bad faith; (5) Effectiveness of alternate sanctions; (6) Meritoriousness of the claim or defense.

The Magistrate Judge cited factors (1) personal responsibility, (2) prejudice, (3) dilatoriness, and (4), inadequacy of alternate sanctions in her Recommendation to Dismiss. Examination of the analysis shows that dismissal was unjustified.

i. **Factor 1: Personal Responsibility**: The Magistrate Judge cited this factor because Petitioner had not submitted income affidavits until ordered to do so. The Magistrate Judge concluded that the affidavits had omitted critical information concerning his *source* of income. Parties are required to provide information specifically *ordered* by the court (Fed. R. Civ. P. 41), and are not expected to engage in proactive guesswork as to what documentation will satisfy the court's requirements. Under the heading Software Sales, the Petitioner included in the income figures the entire amount paid to him by Expert Choice, Inc. The name of Expert Choice, Inc., or for that matter, of any party from which Petitioner derived self-employment income, could and should have been obtained by conferral if deemed necessary by Respondent. The Respondent, however, violated local and federal rules and failed to do so while the Petitioner complied in full with the court's order.

ii. **Factor 2: Prejudice**: The Magistrate Judge concluded that "[d]efendant has been injured by Plaintiff's failure to provide information concerning his *sources* of income..."but did not articulate how

Respondent was prejudiced. Absent such articulation, dismissal was an abuse of discretion. *Coleman v. American Red Cross*, 23 F. 3d 1091 (6th Cir. 1994).

In *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3rd Cir. 1984), the Third Circuit vacated an order of dismissal in the U.S. District Court for the Western District of Pennsylvania, holding that the conduct at issue did not warrant dismissal. The Court set forth examples of prejudice, including irretrievable loss of evidence, the dimming of witnesses' memories, and excessive or irremediable costs or burdens on the movant. None of these factors apply here. The Respondent had documentation of Petitioner's earnings and the identity of the payor was readily available had Respondent only asked.

iii **Factor 3: History of Dilatoriness**: The Magistrate Judge found that "Plaintiff personally has been dilatory throughout the course of this entire case in complying with discovery requests." (Appendix 11a). The facts do not support this finding. Even if some delay occurred in the course of discovery, it involved at most two isolated occurrences. There is nothing even remotely like the pattern of noncompliance contemplated in *Poulis, supra*. Petitioner submitted a photocopy of his passport on July 11, 1995. On being advised that the control numbers were missing, Petitioner promptly furnished the original passport with control numbers. Respondent had the required information about Petitioner's income from work Even construing the controversy over identifying *sources* of income as dilatoriness, Respondent was in no way prejudiced, as the dispute concerned lost earnings and Respondent had received from Petitioner accurate documentation of the amounts involved. *Respondent* was dilatory by waiting from July 1995 to February 1996 to

pursue additional information, by taking exaggerated steps to secure information it already had and creating a false impression of noncompliance by Petitioner and falsely misrepresenting the scope of the court order regarding the same information.

iv **Factor 5: Alternative Sanctions:** Fed. R. Civ. P. 37(b)(2)(E) provides:

> [T]he court...may make *such orders in regard to the failure as are just*..." Fed. R. Civ. P. 37(b)(2)(E) goes on to provide: "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party...to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or *that other circumstances make an award of expenses unjust.*

This rule prefers monetary sanctions over dismissal. Implicitly, mitigation is favored for other than extreme misconduct. The rules intent is to induce compliance, not to set extraordinarily high standards that block access to the court. The rule cannot be interpreted to favor dismissal for parities in financial difficulty and lesser penalties for wealthier litigants. Yet the Magistrate Judge recommended dismissal for the stated reason that Petitioner did not have funds to pay a monetary sanction. It was an abuse of the court's discretion to disregard both standards for dismissal and the availability of alternative sanctions in dismissing the case at hand especially upon the basis that the Petitioner is impecunious.

Examination of case law from other circuits reveals beyond any doubt that the Petitioner would not have been sanctioned, much less tossed out of court. Not only did the District Court abandon precedent in dismissing this action and the Third Circuit depart from its own precedent in affirming, it also separated itself from other Circuits.

Dismissal is warranted for fraud, repeated defiance, or other severe and persistent misconduct, and then only when other sanctions fail to cure the misconduct.

The Third Circuit's ruling in this matter allows sanctions which may eviscerate a valid case without grounds -- as happened here, the consequences can be especially disastrous when a discovery order is issued orally from the bench. Instead of clarifying her order, the Magistrate Judge allowed the proceedings to be sidetracked, and ultimately recommended dismissal, over a dispute concerning a single word—*source*—that was not part of her order. In adopting this recommendation without comment, the District Court countenanced this aberrational ruling.

Substantial controversies are rarely dismissed for discovery violations. The monetary claims at issue in this case have a potential value of millions of dollars.[2] *Chambers v. NASCO*, 501 U.S. 32, 111 sect. 2123, 115 L.Ed.2d. 27 (1991), concerning the $18 million sale of a television station, described "a scheme...to deprive this Court of jurisdiction" and "a plan of obstruction, delay, harassment and expense sufficient to reduce NASCO to ... exhausted compliance.'" *Id.*, at 41, quoting *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 136 (W.D. La. 1989). Petitioner Chambers was assessed close to $1 million in sanctions and several attorneys were disciplined, but dismissal was not at issue. This Court addressed the trial court's power to impose monetary sanctions.

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[2] For example, a certified public accountant offered an expert opinion that as of July 1, 1995, three years following dismissal from his Ph.D. studies, Petitioner had lost $2,002,676 of his lifetime earning potential. Report of Gregory J. Stemler, September 1, 1992.

Historically, other Circuits have imposed sanctions only for noncompliance with the court's explicit directives. *R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F. 2d 11 (1st Cir. 1991), considered a party's outright refusal to comply with a discovery order. The First Circuit held that Rule 37(b)(2)(c) may be employed only when a court order is in effect and has been violated.

Explicitly or implicitly, other Circuits' tests for the appropriateness of dismissal closely replicate the Third Circuit's *Poulis* test, *supra*. Willfulness and personal responsibility are cited repeatedly and appear to be paramount. "Where the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's non-compliance must be due to willfulness, fault or bad faith." *Sigliano v. Mendoza*, 642 F. 2d 309, 310 (9th Cir. 1981). A history of dilatoriness is either a prong in the test or offered as evidence of willfulness and/or personal responsibility. Case law recites multiple dereliction, persistent defiance or evasion, warnings and opportunities to comply before dismissal is ordered or affirmed for dilatoriness. Even a series of delays pertaining to specific elements of discovery does not in itself constitute grounds for dismissal, absent a showing of repeated defiance, fraud or prejudice. Prejudice is generally expressed as a correlation between the missing discovery and the opposing party's inability to gather evidence or prepare a case concerning specific controverted acts; it is also the destruction of evidence or unavailability of witnesses resulting from unwarranted delay. Whether intermediate sanctions are imposed or not, parties are warned of possible sanctions, including dismissal, and given at least a second chance to comply. Dismissal is a last resort, appropriate only when lesser sanctions would

not produce compliance. *Navarro v. Cohen*, 856 F. 2d 141, 142, (11th Cir. 1988).

Even if the Magistrate Judge's order required disclosure of Expert Choice, Inc. as the payor of income from software sales, the initial omission was at most a misunderstanding by Petitioner. Misunderstanding, inability to comply, or even simple negligence does not warrant a dismissal. *In Re Chase & Sanborn Corp.*, 872 F. 2d 397, 400 (11th Cir. 1989).

Parties are offered the opportunity to cure even willful derelictions. In *Technical Chemical Company v. Ig-Lo Products Corp.*, 812 F. 2d. 222 (5th Cir. 1987); 7 Fed. R. Serv. 3d 58, a litigant twice failed to appear for depositions, failed to attend a hearing, and offered excuses the Magistrate found "incredible." The trial court declined the Magistrate's recommendation to enter a default judgment and again offered the party to appear for deposition. After the party disobeyed this second order the District Court entered a default judgment. The Fifth Circuit affirmed:

> [A] district court does not abuse its discretion when it dismisses a suit with prejudice for *repeated failures* to appear for deposition when these failures culminate in a party's failure to comply with a court order to appear. *Kabbe v. Rotan Mosle, Inc.*, 752 F. 2d 1083, 1094 (5th Cir. 1985); *Bonaventure v. Butler*, 593 F. 2d 625, 626 (5th Cir. 1969). The same conclusion is appropriate in this case where the district court entered a default judgment against a would-be plaintiff who, *without a plausible excuse, twice disobeyed explicit court orders to appear* for his deposition. *Id.*, at 225. (Emphasis added.)

Another Fifth Circuit case, *Truck Treads, Inc. v. Armstrong Rubber Company*, 818 F. 2d 427 (5th Cir. 1987), articulates a correlation between violations of discovery orders and prejudice to the adversary. Appellant Truck Treads twice failed to respond accurately

or completely to interrogatories and was warned. After a third inadequate response, the trial court dismissed with prejudice. The Fifth Circuit affirmed:

> Defendant Armstrong sought information relating to appellants' price-discrimination claim. *Interrogatories ... inquired which sales ... were discriminatory and how much was claimed in damages. Appellants never specifically recited the sales upon which they based their claim, nor did they ever precisely identify their damages...* [A]ppellants' evasive response left the defendants in complete ignorance of the substance of their contentions almost one year after the case was filed. ...
>
> Because appellants did not identify the specific sales upon which they based their claims, defendants were without the information necessary to prepare their stated defense of economic justification. *Id.*, at 429-30. (Emphasis added.)

Truck Treads is distinguished from the case at hand in that the court identified a need for information about specific transactions: the defendant could not have rebutted allegations of price discrimination without documentation of occurrences. Also unlike the case at hand, plaintiff was given, and passed up, three chances to obey an explicit court order. Nor was that the extent of the misconduct, the *Truck Treads* plaintiff filed its own Motion to Compel against defendant and disobeyed the local court rule requiring conferral with opposing counsel. In the instant case, there was no court order to identify specific parties or transactions, Petitioner was given no opportunity to correct asserted omissions and the court allowed Respondent to disregard the local conferral rule with impunity. To affirm dismissal would be facially unjust, would *invite* contempt for court orders and disregard for local rules.

Hindmon v. National-Ben Franklin Life Insurance Corp., 677 F. 2d 617 (7th Cir. 1982), considered willfulness, dilatoriness, warnings and demonstrated prejudice in affirming the district court's order of dismissal:

> Plaintiff's course of conduct...demonstrates a willful failure to comply with court-ordered discovery. Moreover, Hindmon's refusal to appear for his deposition...as well as his submission, more than four months after [deadline], of incomplete and improperly executed Answers to Interrogatories provide independent grounds for...sanctions...[T]he district court specifically found that Hindmon's failure to provide discovery had seriously hindered [defendant's] trial preparation. *Id.*, at 621.

The Sixth Circuit applies a four-prong test to Rule 37 dismissals: 1. Willfulness, bad faith or fault; 2. Prejudice; 3. Whether the dismissed party was warned; and 4. Whether lesser sanctions were considered or attempted. *Bank One of Cleveland, N.A. v. Abbe*, 967 F. 2d 1067, 1073 (6th Cir. 1990). Three of these factors parallel the Third Circuit's *Poulis* test. The fourth warning, is implicit in *Poulis*'s consideration of the history of dilatoriness and the availability of alternate sanctions. Warnings and at least second chances are the norm in the Third and other Circuits.

In *Bass v. Jostens*, 71 f. 3d. 237 (6th Cir. 1995), the court found all four of the *Bank One* factors over three years of noncompliance, Appellant Bass disobeyed two discovery orders. The district court issued a third, with a conditional recommendation to dismiss. After appellant disobeyed four court orders in all, failed to appear for a deposition, failed to seek any protective order from the court and was repeatedly warned, the magistrate unconditionally recommended dismissal. The Sixth Circuit found prejudice to the defendant. Plaintiff's noncompliance

demonstrably hindered defendants' ability to gather evidence. In the three years following commencement of the action, many potential defense witnesses had left the company. The Circuit Court found that earlier monetary sanctions had been ineffective. In the case at hand, by contrast, Petitioner responded immediately to Respondent's earlier request for a complete photocopy of his passport by furnishing the intact original. Respondent then waited seven months—from July 1995 to February 1996—to seek additional information concerning lost wages, suggesting that it was unconcerned about potential prejudice caused by delay, and may even have seen delay as advantageous to itself. Respondent's altogether unnecessary action in subpoenaing Expert Choice, Inc. for the same income information Respondent already had been furnished by Petitioner was a deceptive exercise designed to mislead the court into believing that Petitioner had failed to comply with discovery and that Respondent had needed to resort to extraordinary measures.

Although the Federal Circuit arguably applies more loosely than others the standards for affirming dismissals, it like other Circuits, requires violation of a court order and looks for a *pattern* of noncompliance. In *Adkins v. U.S.*, 816 F. 2d 1580 (Fed. Cir. 1987), the U.S. Claims Court dismissed 37 of the more than 1,000 individual plaintiffs for failure to respond timely to interrogatories. The Circuit Court affirmed regarding 34 plaintiffs, finding that they had been granted four time extensions in all, had been warned and had been dismissed only after the government's second motion. The court made no specific finding of willfulness, but held that the dismissed plaintiffs had failed to establish any excuse for their failure to respond. The issue thus was not

willfulness per se, but rather which party bears the burden of proof as to whether noncompliance is excusable. The decision does not approach the de facto strict-liability standard that the Third Circuit applied to the case at hand. In the instant case, moreover, Respondent, the moving party, delayed its pursuit of additional information as to Petitioner's income.

The Third Circuit goes beyond some other Circuits with its explicit requirement that the meritoriousness of the claim be considered. *Poulis, supra*, 747 F. 2d at 869. In close cases, precedent favors resolution on the merits. *Adams v. Trustees N.J. Brewery Trustfund*, 29 F. 3d 863, 875 (3rd Cir. 1994); *Scarborough v. Eubanks*, 747 F. 2d 871, 878 (3rd Cir. 1984).

This Honorable Court has held that sanctions must be just and must be specifically related to the claim at issue in the discovery order. *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 707; 102 §2099, 2107; 72 L.Ed. 2d, 492 (1982). Although the decision does not set forth a test for either of these requirements, appropriate tests can be inferred from its recital of the facts that led up to the imposition of a sanction—in this case, the taking as established of the district court's personal jurisdiction. Petitioners disobeyed "repeated" orders to provide discovery, "repeatedly" agreed to comply and broke their agreements. They were given "ample" warnings and were even given an opportunity to escape sanction simply by producing evidence that the court lacked personal jurisdiction. In short, there was a substantial history of dilatoriness without excuse, from which the district court could infer personal responsibility, willfulness or both. Dilatoriness, willfulness and personal responsibility are constantly reiterated in case law. Even when

found in abundance, however, those factors do not necessarily lead to dismissal.

Insurance Corp. of Ireland, supra, was heard by the District Court for the Western District of Pennsylvania and taken on appeal by this Honorable Court from the Court of Appeals for the Third Circuit. This very tribunal has now disregarded this Court's criteria by dismissing the case at hand. If the dismissal stands, the way will be open for every federal tribunal to do likewise, deciding discovery cases on whim and without reference even to controlling authority. Movants for sanctions who themselves abuse discovery or disobey court orders and come to court with unclean hands now stand to benefit from their improprieties.

This Court is respectfully requested to grant a Writ of Certiorari to reaffirm consistent, reasonable and equitable standards for the conduct of discovery and the imposition of sanctions to reassert discovery rules are calculated to promote not thwart adjudication of meritorious cases before the U.S. District Courts, and to resolve the division between the Third and other Circuits that dismissal of the instant case has created.

C. *The District Court abused its discretion in failing to articulate on the record its reasons for denying Petitioner's Motion for Reconsideration and Rule 52(b) Motion.*

In dismissing this case without opinion, the District Court disregarded the controlling authority of the United States Court of Appeals for the Third Circuit and of this Honorable Court. On May 9, 1996, The Honorable William Standish signed an order adopting the Report and Recommendation of Magistrate Judge Sensenich. The

Petitioner filed a Motion for Reconsideration and a Motion to Request a Hearing Date for further findings consistent with Fed. R. Civ. P. 52(b). Judge Standish denied both motions without opinion, on May 20, 1996. The Report and Recommendation remain to date the only record of the reasons for this most drastic of sanctions.

Petitioner requested a Rule 52(b) hearing for further findings as to which order of the court he violated to justify dismissal. Absent such findings, it is impossible to discern how dismissal comports with this Court's ruling that discovery sanctions must be just and specifically related to the particular claim at issue in the discovery order. *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 707; 102 S. Ct. 2099, 2107; 72 L.Ed. 2d 492 (1982). Petitioner also requested a Rule 52(b) hearing to determine whether Respondent had used available means of discovery to avoid being prejudiced. *Scarborough v. Eubanks*, 747 F. 2d 871, 877 (3d Cir. 1984). Given that Respondent waited seven months before seeking additional financial information about Petitioner and then failed to confer at all with his counsel the Respondent's own behavior was the cause of prejudice, if any resulted.

The Third Circuit has ruled that a Rule 37 dismissal must be accompanied by an articulation on the record of the factual, legal and discretionary issues involved. *Quality Prefabrication v. Daniel J. Keating Co.*, 675 F. 2d 77, 78 (3d Cir. 1982). Absent such articulation, the appellate court is forced to speculate as to the facts that formed the predicate of the district court's decision. 675 F. 2d at 81.

Detailed records of the issues have been the norm in Rule 37 cases. Circuit courts almost invariably cite extensively from district

court proceedings. As parties are not expected to speculate whether their conduct will satisfy court orders, so must appellate courts have a record to examine in determining whether trial courts have properly exercised their authority. In the case at hand, where dismissal represents both a severe injustice to the Petitioner and a drastic departure from precedent, failure to record the reasons can only lead to injustice and contribute to chaos in matters relating to standards of review and the binding authority of the court.

This Honorable Court is requested to grant a Writ of Certiorari to consider whether dismissal of the case at hand without a record of the reasons must be reversed as a matter of law.

II. THE THIRD CIRCUIT ERRED IN UPHOLDING DISMISSAL IN THAT THERE WAS NO ARTICULATION OF THE REASONS THEREFORE, THE SANCTION WAS NEITHER JUST NOR SPECIFICALLY RELATED TO THE CLAIMS AND THE THIRD CIRCUIT'S SILENCE CREATES A CONFLICT BETWEEN IT AND OTHER CIRCUITS.

A. This Honorable Court requires that sanctions be just and specifically related to the claim at issue; without an articulation of the reasons for dismissal, it is impossible to determine whether these criteria have been met.

The only record of the reasons for dismissal in the instant case is the Magistrate's Report and Recommendation, which was adopted without hearing or opinion by the District Court and affirmed without

comment by the Third Circuit. There has thus been no substantive or procedural review of this case or its dismissal—despite the Third Circuit's mandate that there be one on the record and despite the limited circumstances in which dismissal is warranted as a sanction. This matter creates a vacuum for courts in the process of discovery and the employment of sanctions. This Court recognized in *Insurance Corp. of Ireland, supra*, that the discretion afforded court is not *unlimited* freedom of action, nor is the deference generally afforded trial courts to be taken as disregard for standards. When a court takes measures as drastic as dismissing a case, articulation of the reasons goes to the essence of discretion.

In *Insurance Corp., supra*, the noncompliant party was granted two extensions and explicitly warned. The Third Circuit affirmed, holding that:

> "The purpose and scope of the order of discovery were *directly related* to the issue of jurisdiction *and the Rule 37 sanction was tailored* to establish as admitted those jurisdictional facts that, because of the insurer's *failure to comply with discovery orders*, [the adversary] *was unable to adduce* through discovery." *Insurance Corp. of Ireland*, 456 U.SA. at 700, quoting *Compagie des Bauxites v. Insurance Co. of North America*, 651 F. 2d 877 (1981). This Court noted the Third Circuit's finding that "the sanction was no broader than 'reasonably necessary' under the circumstances." *Id.*

It can be inferred that the Third Circuit, even then, tested sanctions according to standards similar to those it would later circulate in *Poulis*. A court order was violated. The Circuit Court found willfulness, personal responsibility or both, a history of dilatoriness, and prejudice to the adversary in gathering evidence. Alternate sanctions appear to have been

irrelevant because the sanction was already narrowly applied to a specific issue. This Court endorsed these criteria.

In holding that the sanction in this case was "just," we rely specifically on the following:

> ...Despite *repeated orders* District Court was able to state that Petitioners "haven't even made any effort to get this information up to this point." The court then *warned petitioners of a possible sanction*. Confronted with continued delay and an obvious disregard of its orders, the trial court's invoking of its powers under Rule 37 was clearly appropriate. *Id.*, at 707. (Emphasis added.)

In holding that the sanction was specifically related to a claim at issue, this Court said:

> Having put the issue [jurisdiction] in question, petitioners did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof. . . *Because of petitioners' failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners* and Pennsylvania, the critical issue in proving personal jurisdiction. *Id.*, at 708. (Emphasis added.)

This Court also strongly implied that articulating the reasons for a sanction strengthens the trial court's position against finding an abuse of discretion:

> [T]he question remains as to whether [Rule 37(b)(2)]was properly applied. ...Because the District Court's decision to invoke the sanction was *accompanied by a detailed explanation of the reasons*... and because that decision was upheld as a proper exercise of the District Court's discretion by the Court of Appeals, this issue need not detain us for long. What was said in *National Hockey League v. Metropolitan Hockey Club* 427 U.S. 639, 642 (1976), is fully applicable here: "The question, of course, is not whether [the Court of Appeals] would...have {[applied the sanction]}; it is whether the District Court abused its discretion in so doing."

The Court of Appeals clearly erred in upholding dismissal of the instance case. Even if any sanction had been warranted, dismissal would have been far out of proportion to the conduct being sanctioned, therefore not "just," as required by the Federal Rules of Civil Procedure and by this Honorable Court. Dismissal also fails the test of specific relationship to a claim at issue. The District Court's failure to articulate its reasons and the Third Circuit's affirmance exemplify the arbitrariness that this Honorable Court explicitly and implicitly rejects. The reasons for this outcome are then left to impermissible speculation. *Quality Prefabrication v. Daniel J. Keating Co.*, 675 F.2d 77, 78 (3d Cir. 1982). Because the Court of Appeals erred in upholding dismissal, the decision must be reversed as a matter of law.

B. Dismissal is the sanction of last resort, used, if at all, in the mosserious and persistent cases of abusive discovery.

The restraint that must govern dismissal as a sanction is well illustrated by cases in which motions to dismiss were denied or where dismissal was not at issue. In *Chambers v .NASCO*, 501 U.S. 32, 111 S. Ct. 2123, 115 L.Ed.2d. 27 (1991), the Court imposed monetary sanctions, arguably the most appropriate choice, given the party's efforts to frustrate both the court case and the controverted business transaction. In *Insurance Corp. of Ireland, supra,* the Third Circuit case at the heart of precedent in this matter, the court deemed an issue as established. In *Libbi v. Sears, Roebuck & Co.*, 107 F.R.D. 227 (1985), unresponsiveness and contradictory statements were sanctioned by

preclusion of evidence. In *Bass v. Jostens*, 71 F.3d 237 (6th Cir. 1995), a third violation of court orders brought only a conditional recommendation to dismiss—a stronger warning than a simple admonition from the bench, because it was also an articulation of the record that could be examined if the court later granted or reviewed a motion to dismiss.

The instant case was dismissed on nothing more than Respondent counsel's say-so that Petitioner failed to comply. Respondent demanded to know the amounts of income, the court ordered disclosure of those sums and the Petitioner complied. The Respondent *asserted* that the court had required the identification of payors; the Magistrate Judge altered the language of the order after the fact, then sanctioned Petitioner in the most extreme way possible for not having complied with *Respondent's altered version* of the order.

Even if the Petitioner had been ordered to identify sources of income and had not complied, the point of last resort would not have been approached. Milder sanctions than dismissal are accompanied by recitations of the conduct that led to them and the rationales for the sanction involved - dismissal without comment for one or two isolated, highly debatable omissions, by comparison, arguably cheapens dismissal as a sanction. If detailed articulation of the reasons is warranted for monetary sanctions, the sanction of dismissal, which extinguishes remedies, requires no less.

CONCLUSION

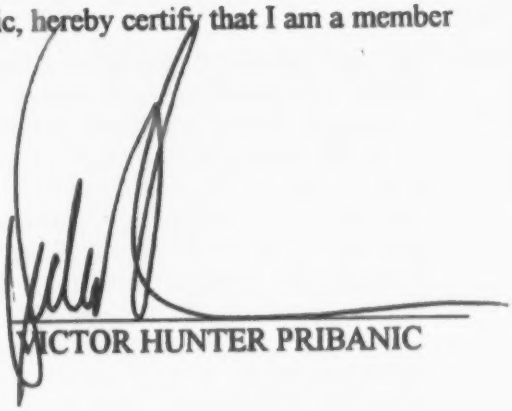
For the foregoing reasons, a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED

VICTOR HUNTER PRIBANIC
Attorney for Petitioner

CERTIFICATE OF MEMBERSHIP IN BAR

I, Victor Hunter Pribanic, hereby certify that I am a member of the Bar of this Court.



VICTOR HUNTER PRIBANIC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IVAN NAUMOV, Plaintiff	)
	) Civil Action No. 94-) 821
vs.	) Judge William L. Stan) dish/) Magistrate) Judge Sen) senich -
THE UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, Defendant	) Re: Doc. #62

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that defendant's motion to dismiss be granted.

II. REPORT

Defendant, University of Pittsburgh (Pitt), is seeking the extreme sanction of dismissal of this action for plaintiff's abuse of discovery, including his failure to disclose a source of income in response to discovery requests.

Plaintiff originally filed this action before the Court of Common Pleas of Allegheny County, Pennsylvania on November 24, 1993 asserting that he was discharged from his employment as a graduate student researcher within the Graduate School of Public Health Ph.D. program inhuman genetics at defendant Pitt. He alleged that his national origin was of the former Yugoslavia and that his legal immigration status was contingent on his enrollment in the Ph.D. program. By defendant's termination of his enrollment he was left without lawful immigration status. He alleged that unless he was restored to his original student status he

remained in danger of falling out of lawful immigration status in the United States and was subject to being forced to leave the country.

Plaintiff alleged that he had been involved in an accident in May of 1991 which resulted in severe multiple fractures to his hands, wrists and other orthopedic problems that required extensive reconstructive surgery and continued physical therapy and medication. His injuries hindered his ability to function as a student and employee of the University of Pittsburgh because much of his work involved the use of his hands and wrists. He was frequently required to write and work on a computer. He alleged that his injuries rendered him handicapped or disabled within the definition in the Pennsylvania Fair Education Opportunities Act and the Human Relations Act. He alleged that he was not given accommodations for his impairments in two courses and received the grades of "F" and "D" in those courses. He alleged that two instructors discriminated against him because of his physical impairments and his national origin. He alleged that he received unsatisfactory grades because he was physically incapable of completing the work within the established time frames. he further alleged that he was never given an opportunity to present his complaint about his grades, as had been promised by administrators.

Plaintiff alleged he was dismissed as a student and an employee on July 14, 1992. He was dismissed without his timely filed formal grievances ever being addressed. Plaintiff subsequently filed a second amended complaint in equity, asserting that defendant had failed to provide him with due process in several aspects of his dismissal from the Graduate School of Public Health and he asserted that his claims were based upon Article I, section I of the Constitution of the Commonwealth of Pennsylvania as well as the Fourteenth Amendment of the Constitution of the United States of America, the common law of the Commonwealth of America, the Americans with Disabilities Act, and section 504 of the Rehabilitation Act of 1993; the Pennsylvania Human Relations Act, 43 P.S. § 951; and the Pennsylvania Fair Educational Opportunities Act, 24 P.S. § 5001. On May 18, 1994 defendant removed this action to this Court pursuant to 28 U.S.C. § 1331.

The instant motion seeking the sanction of dismissal is not the first motion for sanctions filed in this case. Defendant's first motion for sanctions was filed on March 17, 1995, asserting that plaintiff had refused to provide defendant with medical authorizations regarding his medical, psychological and

psychiatric treatment although he had placed his medical condition at issue in 1991 to 1992 as well as his current mental condition. He was also seeking money damages for emotional distress. In addition to refusing to provide defendant with medical authorization, plaintiff had also failed to produce documents defendant had requested in August 1994 regarding his immigration status, although he alleged as part of his claim that his immigration status had been negatively impacted by the University's conduct. He had failed to provide any documents relating to income from his subsequent employment, including personal records of self-employment wages although he was seeking lost wages from July 1992 to the present as part of his damages in the case. He refused to provide authorizations which defense counsel needed to conduct further discovery into the nature of his alleged disability and damages. By order of October 14, 1994 the parties had been required to complete discovery by February 6, 1995. However, defendant's motion for extension of time had been granted and discovery had been continued to March 24, 1995. Oral argument of the motion was set for April 25, 1995. The transcript of that oral argument has been filed as Document NO. 23. Plaintiff was present in person for the oral argument and participated in the exchange. The Court expressed skepticism of plaintiff's assertion that he did not have his immigration records, including his passport and visa, because he had moved from one residence to another. (Tr. 3.) When asked about his passport, he replied that he was a citizen of a country that no longer existed. (Tr. 5.) During that oral argument Ms. Grimm, counsel for the University, advised the Court that although plaintiff was seeking lost wages she had come to the conclusion that he was not making full disclose of income he had received. (Tr. 14.) She added:

> One thing that really has been disturbing about this part of this case, your honor, is that by investing a lot of my counsel time and in interviewing people, I have come up with a couple of the pieces of information where people have told me Dr. Naumov is lecturing for fee or Dr. Naumov is tutoring for fee, all income which I cannot get Dr. Naumov to either itemize for me or even in some cases acknowledge for me.

(Tr. 14-15.) She added:

> And at this point in the case, your honor, I am asking for some kind of a motion compelling

> him to make best efforts by a date certain to give me every piece of information, whether a pay stub or a checking account a deposit register that would reflect deposits, or just whatever he remembers receiving, you know, any documents or any information that he has, because I have just met a total stone wall today.

(Tr.15) Ms. Grimm expressed her opinion that plaintiff was failing to disclose income had had received. (Tr. 16.) Discussing plaintiff's 1994 income, after conferring with plaintiff, Mr. Jug advised that plaintiff had worked for the community college and also worked for another company, A&A Expert Software for a couple of months. (Tr. 17.) Although the argument was held on April 25, 1995, counsel did not reveal that on November 10, 1993 plaintiff had entered into a dealer agreement with Expert choice, Inc. (Expert Choice) pursuant to which he would act as a non exclusive dealer-distributor for Expert Choice software products worldwide with a few exceptions, and that on April 22, 1994 he had entered into another agreement with Expert Choice pursuant to which he would serve as Director for Health Related Research and Development for a period of three years and that he would be paid by commission. Copies of those agreements are attached to defendant's instant motion to dismiss in which defendant advised that defendant's counsel had, through independent investigation, identified Expert Choice as a possible employer of plaintiff. In fact, defendant had obtained from Expert Choice an agreement executed by plaintiff on March 24, 1995, one month before the oral argument, in which Expert Choice agreed to pay plaintiff a commission of 40 percent on seminar attendees he sent to a seminar in May of 1995 and a letter to plaintiff from Expert Choice advising him that when he performed consulting activities or gave workshops or seminars Expert Choice could process his fees. Expert Choice would accept payment by check from the agency or group for whom plaintiff performed the services and would reimburse plaintiff within seven days of the time the funds were received. The letter was sent to plaintiff on April 5, 1995, just 20 days before the oral argument on April 25, 1995. A transaction listing, which is also attached to defendant's motion to dismiss, reveals that plaintiff received $1,713.00 from Expert choice in 1994. On page 14 of the transcript of the oral argument, counsel for defendant expressed her concern that plaintiff was not making full disclosure of his income. Three pages later, on page 17, plaintiff's counsel, after conferring with plaintiff, identified only two sources of income, the community college and another company, A&A Expert Software. he did not disclose the fact that plaintiff had an agreement with Expert

Choice, pursuant to which he had received $1,713.00 in 1994. The Court asked whether plaintiff was willing to say under oath that he had not received any income other than what he had disclosed to the defendant. Again, on page 20, Mr. Jug again referred only to plaintiff's employment by the community college and A&A Expert Software. On page 24 plaintiff was directed to provide an affidavit by May 31 identifying all monies he had gotten from work he had done. (Tr. 24.)

On June 7, 1995 defendant filed another motion for sanctions, asserting that at the time of the oral argument on April 25, 1995 counsel for defendant had not provided her with four authorizations for health care providers. Plaintiff had declined to sign the authorizations at that time. Over two months later, on June 1, 1995 counsel for defendant had received three of the four executed authorizations. The delay in receiving the authorizations had prohibited defendant from receiving any records in time to serve any follow-up interrogatories to plaintiff during the extended discovery period which was to be completed by June 30,1995. (Tr. at 23, Apr. 25, 1995.) Defendant's counsel still had not received an authorization relating to plaintiff's treating clinical psychologist, Harold Levitt. Further, plaintiff still had not provided any information regarding his income or his immigration status. Defendant argued that it was severely prejudiced by plaintiff's conduct and sought dismissal of the law suit as an appropriate sanction as well as attorneys' fees. The oral argument of that second motion for sanctions was heard on July 11, 1995. That transcript has been filed as Document No. 35. During that oral argument counsel for defendant referred to her complaint in her first motion for sanctions about plaintiff's responses during his deposition which was taken on March 2, 1995. Although copies of the relevant pages of the deposition have not been produced in the record, counsel for defendant quoted from them in her memo filed in connection with the instant motion and plaintiff's counsel agreed they were accurate. During his deposition plaintiff testified as follows:

Q. Other than CCAC and A&A Expert Software, what other sources of income have you had during calendar years 1993 and 1994?

A. I have borrowed money from friends.

Q. I need an answer to my question as to what other sources of money for in-

> come, monies that you have earned for the years 1993 and 1994.
>
> (Counsel and witness confer off the record.)
>
> A. No other sources. I survived due to the fact that some of my friends family helped me with loans.
>
> Q. And you haven't received any other income for services rendered from any other source during 1993 and 1994; is that correct?
>
> A. Yes, I was not employed anywhere else.

(Def.'s Mem. at 2, Feb. 21, 1996, quoting from Naumov Dep. at 116-19 attached to the Grimm Aff. Doc. No. 18.) During his deposition of March 2, 1995 plaintiff did not reveal that he had received $1,713.00 from Expert Choice, Inc., a company with which he had been under agreement since April 22, 1994. During oral argument counsel for defendant noted on the record that although she had provided plaintiff with the medical authorizations at the time of the oral argument on April 25, 1995 plaintiff, in her presence, had refused to sign them and she did not receive three of them until June 1 and did not receive the psychologist's authorization until June 12, although the Court had ordered at the time of the April 25, 1995 that discovery was to be concluded by June 30, 1995. (Tr. 4.)

During the oral argument on July 11, 1995 counsel for plaintiff advised that plaintiff had finally found his passport. It is noted that this was after the Court had expressed skepticism during the April 25, 1995 argument of plaintiff's claim that he, an immigrant, could not find his passport. (Tr. 15.) Counsel advised that he had provided defendant with the passport. Defendant's memorandum of law in support of its motion to dismiss, page 13, notes that after plaintiff provided defendant with a copy of his passport pursuant to the April 25, 1995 order, defendant subsequently discovered that the control numbers had been secretly redacted from the copy of the passport given to defendant. During oral argument counsel for defendant showed the Court the original copies which had been given to her in which

the control numbers had been redacted and a subsequent copy she had been given after she complained about the redaction.

During the oral argument on July 11, 1995 counsel for plaintiff admitted that his client had refused to sign the medical authorizations after the order was entered on April 25, 1995 because he wanted to talk to other people. He did not provide the signed authorizations until May 31, over a month after he was ordered to provide them. (Tr. 16.) Counsel also agreed that he did not receive the executed authorization for the psychological records from plaintiff until June 9. During that oral argument counsel for defendant complained that defendant had to incur the expense of attempting to find out where plaintiff worked because he had refused to disclose that information. (Tr. 18.) She also complained that the income affidavits (Document No. 64) plaintiff had provided as required by the order of April 25, 1995, did not indicate the sources of the income identified. She argued that she should be entitled to discovery into the sources of his income. (Tr. 18-19.) Following that oral argument the Court concluded that although dismissal was not an appropriate sanction, other sanctions were clearly appropriate. (Tr. 21.)

On August 9, 1995 an order was entered awarding defendant $2,434.62 against plaintiff as a sanction for his failure to provide requested discovery. An opinion was filed on the same date. The Court found that Ms. Grimm had made a good faith effort to obtain the discovery without court action and that plaintiff's substantial delay in disclosure was not substantially justified. That opinion included the following:

> The information Ms. Grimm was seeking was clearly relevant and production should not have been difficult. Basically she sought authorizations for medical records which were relevant because of plaintiff's claims for "extreme emotional anguish and distress". Further, she sought all income plaintiff had received since his termination by the University. It is not clear why plaintiff claimed he could not produce this information until he had engaged an accountant to prepare his tax returns an the returns had been completed. Ms. Grimm also sought plaintiff's passport and information about his immigration status since he claimed that defendant's termination of his left him without lawful immigration status. His claim that he could not find his passport or any

> other documents relating to his immigration status because the University forced him to move from his campus apartment is not credible.
>
> Plaintiff resisted, every way he could, providing defendant with the discovery it needed to prepare for trial.

(Op. on Award of Sanctions at 2-3.)

The instant motion to dismiss was filed on February 21, 1996. As had been noted, defendant obtained information that plaintiff had entered into a dealer agreement with Expert Choice, on November 19, 1993 pursuant to which he agreed to act as a nonexclusive dealer/distributor for the Expert choice Software products worldwide. Then, on April 22, 1994 he entered into another agreement pursuant to which he would serve as director for Health Related Research and Development for Expert Choice for a period of three years, with automatic renewal for another two years unless any of the parties expressed in writing that they no longer wished to continue the relationship. In 1994 plaintiff received $1,713,00 from Expert Choice in 1995, the transaction listing reveals that when he submitted his income affidavits on June 12, 1995 he had received $1,638.25 from Expert Choice in 1985. However, his affidavits do not identify Expert Choice as a source of income.

The affidavit of Pamela J. Grimm, Document No. 18, which was filed on March 17, 1995 included defendant's first set of interrogatories and plaintiff's response. Interrogatory No. 2 provided as follows:

> Describe in detail any and all actions taken by plaintiff, or any representative of plaintiff, following plaintiff's termination of employment with defendant, to secure employment elsewhere or to mitigate the damages which plaintiff alleges to be due plaintiff in this action. Included within this description should be any and all applications or interviews for employment and any and all attempts to establish or buy a business operation. (Emphasis added.)

Plaintiff's answer to that interrogatory did not include any reference to his agreements with Expert Choice although the answers were executed on January 3, 1995.

Plaintiff responds to defendant's motion to dismiss by arguing, first, that any discrepancy between the amounts of income he reported in his income affidavits and his actual income are minor. He suggests that the discrepancy is explained to some extent by the fact that he listed some of his income for a different year than that reported by Expert choice. However, the fact is that although defendant has continually been attempting to determine all sources of his income, he has never revealed the fact that Expert Choice was a source of income, although he has been under various agreements with it since November 10, 1993.

Plaintiff also attempts to execute his failure to reveal his relationship with Expert Choice by referring to Exhibit B which is attached to defendant's motion to dismiss. That is a letter from the general manager of Expert Choice "To Whom It May Concern," dated February 9, 1996 in which he stated that plaintiff was not an employee of Expert Choice, but served as an outside consultant as its Director for Health Related Research and Development. The fact that plaintiff was not technically an "employee" does not excuse his failure to identify Expert Choice as a source of income.

Counsel for plaintiff also refers to the oral argument on April 25, 1995 when counsel for defendant commented that plaintiff took issue with her use of the work "income" and made it clear that she wanted information about plaintiff's receipt of any money for services rendered. (Tr. 17.) Counsel for plaintiff therefore argues that plaintiff was not willfully refusing to comply with discovery by failing to reveal income he received from Expert Choice since he did not consider it to be "income," because he was not an employee. this is a specious argument. It has been clear throughout the discovery proceedings that defendant has been seeking to obtain all of plaintiff's sources of income and he intentionally has not provided them.

Plaintiff also argues that through the income affidavits he provided defendant with the information it sought. However, that information was provided only after oral argument on defendant's second motion for sanctions, and did not identify Expert Choice as a source of income.

Plaintiff also argues that during the April 25, 1995 argument the Court mentioned that if defendant obtained

information about his income that plaintiff had not disclosed, then his testimony could be used to impeach him at a trial. (Tr. 18.) Counsel argues that plaintiff was not advised that this case could be dismissed if he failed to provide the information requested. However, during the argument on July 11, 1995, at which time defendant was seeking dismissal as a sanction, the Court stated that although she did not feel dismissal was appropriate at that time, some sanctions were clearly appropriate. (Tr. 21.) Therefore, the availability of dismissal as a sanction was discussed on the record. Defendant was awarded counsel fees in the amount of $2,434.62 as a sanction for plaintiff's failure to provide requested discovery.

The Court of Appeals for the Third Circuit clearly identified the factors the Court must consider prior to dismissing a case as a sanction for the plaintiff's misconduct in Poulis v. State Farm Fire & Cas. Co.,, 747 F.2d 863 (3d Cir. 1984) (Poulis II); Scarborough v. Eubanks, 747 F.2d 871 (3d Cir. 1984); and Poulis v. State Farm Fir & Cas. Co., 714 F.2d 124 (3d Cir. 1983) (Poulis I). In Poulis II the court affirmed dismissal of the plaintiff's complaint with prejudice for counsel's failure to meet court imposed deadlines as to filing his pretrial statement and his complete failure to respond to interrogatories. The first factor the Court is to consider in determining whether to dismiss a case is the extent of the party's personal responsibility. Here it is clear that plaintiff has personally resisted complying with discovery requests and orders. When defendant asked for his immigration records he claimed he could not find them because he had moved. After the Court expressed skepticism of this excuse plaintiff located his passport. However, he secretly redacted the control number from the copy provided to the defendant. Although he sought damages for emotional distress he refused to provide medical authorizations until ordered to do so. Even after he was ordered to do so on April 25,1995 he waited for over a month to sign three of the four authorizations and still longer to sign the fourth one. He resisted defendant's efforts to determine all of his sources of income, information it needed to defend his claim for back pay and to determine what efforts he had made to mitigate his damages. His income affidavits were filed only after he was ordered to do so and they omitted critical information concerning his sources of income. The Court finds plaintiff wilfully failed to comply with discovery requests and court orders. Therefore, the first factor weighs heavily against him.

The second factor is prejudice to the adversary. Defendant has been injured by plaintiff's failure to provide information concerning his sources of income. The last date of completion of discovery, after several extensions due to plaintiff's

failure to comply with discovery requests, was June 10, 1995. In February 1996 defendant learned through independent investigation that plaintiff had at least one source of income, Expert Choice, which he had not disclosed. This raises a question as to whether plaintiff may have had other sources of income which he has not disclosed and which defendant has been unable to discover. Although discovery was to be concluded by June 30, 1995 plaintiff delayed in providing defendant with medical authorizations, limiting defendant's ability to obtain additional discovery after obtaining the medical records. Defendant has been seriously prejudiced in attempting to prepare this case for trial because of plaintiff's delay and his refusal to provide discovery requested and ordered. This factor weights heavily against plaintiff.

The third factor to consider is a history of dilatoriness. Plaintiff, personally, has been dilatory throughout the course of this entire case in complying with discovery requests. This factor weights heavily against him.

The fourth factor is whether the attorney's conduct was willful or in bad faith. Plaintiff's counsel has no responsibility for plaintiff's willful conduct discussed in this opinion. During oral argument Mr. Jug conceded that he had no knowledge of the fact that Expert choice was a source of income for plaintiff until he received a copy of defendant's motion to dismiss. Further, he did not realize that plaintiff had redacted the control number from the copy of his passport plaintiff gave him to give to defendant. The conduct in this case which the Court believes justifies dismissal is that of plaintiff not his counsel.

The next factor is the adequacy of other sanctions. Monetary sanctions clearly are not adequate since during oral argument plaintiff's counsel admitted that plaintiff has not complied with the order of August 9,1995, awarding defendant counsel fees in the amount of $2,434.62 against plaintiff. Counsel explained that plaintiff does not have the funds to pay the award. Another possible sanction would be to strike plaintiff's claims for financial damages. This sanction would address plaintiff's failure to provide information concerning his sources of income but would not address his refusal to provide information about his immigration status and his redaction of the control number from his passport. Plaintiff's counsel argues that the control number was redacted because of plaintiff's concern about the privacy of his immigration records. However, the way to address that concern was by proper motion, but by secretly redacting information from a document required to be produced in

discovery. An order striking plaintiff's demand for money damages would not address plaintiff's failure to provide information concerning his immigration status, an issue raised in his complaint. Therefore, there do not appear to be any sanctions other than dismissal adequate to address plaintiff's willful failure to comply with discovery requests and orders.

The final consideration is the meritoriousness of the plaintiff's claim. The Poulis court recognized that summary judgment standards are not used in considering this factor. Poulis II at 869. However, both parties have filed motions for summary judgment. Plaintiff argues that he is entitled to partial summary judgment on the issue of liability for a violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Hew asserts that he has shown he is a "handicapped individual"; that he is "otherwise qualified" for participation in defendant's Ph.D. program in Human Genetics at the Graduate School of Public Health at the University of Pittsburgh; that the program receives "federal financial assistance" and that he was denied the benefits of "or subject to discrimination" under the program. Defendant responds to plaintiff's motion for summary judgment by asserting that plaintiff refers to documents which do not satisfy the requirements of Rule 56 of the Federal Rules of Civil Procedure. Defendant asserts that plaintiff's action was filed after the statute of limitations had expired; that he has not shown that he was excluded from the position he sought solely by reason of his handicap, noting that he testified that he believed he was severely discriminated against by the University as a result of false criminal charges brought against him. Defendant finally asserts that plaintiff is not a qualified individual under the act. At this time, without considering the cross-motions for summary judgments on their merits, it cannot be said that plaintiff's complaint does not have merit. However, factors one, plaintiff's personal responsibility, two, prejudice to the defendant, three, history of dilatoriness and five, the inadequacy of alternative sanctions lead the Court to conclude that dismissal of this action is the only appropriate sanction for plaintiff's failure to comply with discovery requests. During the oral argument on April 25, 1995 plaintiff was ordered to provide an affidavit of income by May 31, 1995. (Tr. 25.) He was required to say under oath that he had not received any income other than what he had disclosed to the defendant. (Tr. 17.) The income affidavits he provided did not reveal that he received income from Expert Choice, Inc. and where in violation of that order.

Rule 41(b) of the Federal Rules of Civil Procedure authorizes the Court to dismiss an action for the plaintiff's failure

to comply with an order of court. (Rule 37(b) (2) (C) also authorized dismissal of an action for the failure of a party to obey an order to provide or permit discovery. Finally, Rule 16(f) authorizes the Court to enter orders as provided in Rule 37(b) (2) (C) for a party's failure to obey a scheduling or pretrial order. Plaintiff's failure to reveal in his income affidavits the fact that he received income from Expert choice, after a long history of Defendant's attempts to obtain all of his sources of income, requires that defendant's motion to dismiss be granted and it is so recommended.

It is noted that in Poulis II the court affirmed the sanction of dismissal based upon counsel's failure to file his pretrial statement as ordered and failure to provide answers to interrogatories. In that case there was no suggestion that the plaintiffs were personally responsible. Here, plaintiff himself is responsible for resisting discovery by delay, by secretly redacting information from documents produced for defendant and by deviously providing incomplete information. The factors justifying dismissal in this case appear to be much stronger than those in Poulis II. Therefore, it is recommended that defendant's motion to dismiss be granted.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b) (1) (B) and (C), and Rule 72.1.4(B) of the local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

S/Ila Jeanne Sensenich
ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: April 15, 1996

cc: The Honorable William L. Standish
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IVAN NAUMOV, Plaintiff	)
	) Civil Action No. 94-821
vs.	) Judge William L. Standish/ Magistrate Judge Sensenich
THE UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, Defendant	) Re: Doc. #62

MEMORANDUM ORDER

On May 20, 1994, this case was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28, U.S.C. Sections 636 (b) (1) (A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on April 16, 1996, recommended that defendant's motion to dismiss be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by plaintiff on April 25, 1996. After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response to objections thereto, the following order is entered:

AND NOW, this 9th day of May, 1996;

IT IS HEREBY ORDERED that defendant's motion to dismiss is granted.

The report and recommendation of Magistrate Judge Sensenich, dated April 15, 1996, is adopted as the opinion of the court.

S/William L. Standish
William L. Standish
United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IVAN NAUMOV, Plaintiff	)
	) Civil Action No. 94-821
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THE UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, Defendant.	) Re: Doc. #62

ORDER

AND NOW, to-wit, this 20th day of May, 1996, upon consideration of Plaintiff's Motion Requesting a Hearing for Further Findings and Reconsideration of the Memorandum Order of May 9, 1996, it is hereby ordered that said Motion is Denied.

By The Court:

S/William L. Standish J.
Honorable William L. Standish
District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3308

IVAN NAUMOV

v.

UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION

IVAN NAUMOV, M.D., APPELLANT

Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civ. No. 94-cv-00821
(District Judge: Honorable William L. Standish)

Argued: January 27, 1997

Before: BECKER, ROTH, Circuit Judges, and ORLOFSKY, District Judge. *

JUDGMENT ORDER

After considering the contentions raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district court of May 21, 1996 be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT:

S/

Circuit Judge

* Honorable Stephen M. Orlofsky, United States District Judge for the District of New Jersey, sitting by designation.

Attest:

S/ P. Douglas Sisk, Clerk
P. Douglas Sisk, Clerk
FEB - 6 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3308

IVAN NAUMOV

v.

UNIVERSITY OF PITTSBURGH OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION

IVAN NAUMOV, M.D.,
APPELLANT
(D.C. DOCKET NO. 94-CV-00821)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges, and ORLOFSKY, District Judge. *

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

S/

Circuit Judge

DATED: MAR 28 1997

* As to panel rehearing only.